STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition of Montauk Improvement Co.	:
	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision of a Determination or a Refund of Corporation Franchise Tax under Article 9A of the Tax Law for the Years 1969 & 1970.	:

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by certified mail upon Montauk Improvement Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Montauk Improvement Co.
511 Fifth Ave.
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
28th day of September, 1979.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Montauk Improvement Co. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Corporation Franchise Tax :
under Article 9A of the Tax Law
for the Years 1969 & 1970. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by certified mail upon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sirs
Margolin, Winer & Evens
600 Old Country Rd.
Garden City, NY 11530

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
28th day of September, 1979.

September 28, 1979

Montauk Improvement Co.
511 Fifth Ave.
New York, NY 10017

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

Robert F. Mullen

cc: Petitioner's Representative
Margolin, Winer & Evens
600 Old Country Rd.
Garden City, NY 11530
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions of MONTAUK IMPROVEMENT, INC. and MONTAUK COUNTRY CLUB, INC. for Redetermination of Deficiencies or for Refunds of Franchise Tax on Business Corporations under Article 9A of the Tax Law for the Fiscal Years ended April 30, 1969 and April 30, 1970.	DECISION

Petitioners, Montauk Improvement, Inc. and Montauk Country Club, Inc., filed petitions for redetermination of deficiencies or for refunds of franchise tax on business corporations under Article 9A of the Tax Law for the fiscal years ended April 30, 1969 and April 30, 1970 (File No. 01928).

A formal hearing was held before John J. Genevich, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on October 26, 1973 at 10:00 A.M. Petitioners appeared by Seymour Zelanko and Robert Coleman of Margolin, Winer & Evans, Certified Public Accountants.

A decision affirming the deficiencies was issued by the State Tax Commission on September 18, 1974, but was annulled by the Supreme Court, Appellate Division, Third Department. Upon appeal to the Court of Appeals, the judgment of the Appellate Division was modified by remitting the matter to the State Tax Commission with instructions to make findings of fact in support of whatever decision it deemed proper, based on evidence previously presented.

ISSUES

I. Whether petitioner Montauk Improvement, Inc. and its subsidiary, petitioner Montauk Country Club, Inc. should be permitted to file combined franchise tax returns for the fiscal years ended April 30, 1969 and April 30, 1970.

II. Whether the assessments for the fiscal years ended April 30, 1969 were barred by the statute of limitations.

FINDINGS OF FACT

1. Both petitioner Montauk Improvement, Inc. (hereinafter sometimes referred to as "Improvement") and its wholly-owned subsidiary, petitioner Montauk Country Club, Inc. (hereinafter sometimes referred to as "Country Club") were incorporated under the laws of New York State on February 11, 1966. Both corporations do business in New York State only.

2. Sometime prior to the years at issue, one or both of petitioners acquired a substantial amount of land at Montauk, New York, a sparsely populated locality on eastern Long Island, known basically as a recreational area. The land was acquired from one seller, in one transaction. The acquisition included an existing golf course; however, the golf course and its facilities were in great need of repair at the time of the acquisition.

3. The record does not reveal the manner in which one or both of petitioners took title to the acquired land; however, Country Club, was "set up to encompass the existing facility that was there at the time", i.e., the golf course and its immediate surroundings and said corporation made repairs and improvements to the golf

course, the dining room and other portions of the club. During the years at issue, Country Club operated the golf course, restaurant, tennis courts, swimming pool and other facilities for its members and for the general public. Country Club's income was derived basically from membership dues, greens fees and restaurant profits, if any.

During the years at issue, Improvement was engaged in the business of owning, developing and selling lots for home sites and land for other purposes to individuals, developers and others. It also built and sold homes. The land involved was essentially the land acquired in the earlier transaction, but did not include the land on which the golf course and its facilities were located. The land was located in various subdivisions at Montauk: Some lots were on or near Long Island Sound; others were near the Atlantic Ocean or Lake Montauk. The golf course and its facilities were approximately central to the subdivisions and some of the lots were contiguous thereto.

4. Improvement guaranteed loans made to Country Club in connection with the improvements to the golf course and facilities. Petitioners contend that the improvements and repairs made to the golf course and its facilities were done not only for the purpose of making the golf course profitable, but for the purpose of creating a facility which would enhance the desirability of the lots sold by Improvement.

5. Improvement used Country Club for promotional purposes. Its advertising featured the golf course and Country Club's facilities

were used by Improvement's sales and administrative personnel directly in their sales efforts with prospective individual customers. Country Club did not, however, make a sales or promotional charge to Improvement for these services.

6. Both Improvement and Country Club had identical officers and directors. Both corporations used some common employees and shared common offices. The active role of management of both corporations was handled by a firm of real estate construction, development and management consultants who provided supervising and consulting services on an exclusive basis and were retained and paid by both corporations.

7. Improvement and Country Club filed consolidated United States Corporation Tax returns for the years at issue and also filed combined New York State Franchise tax returns for said years without receiving prior permission from the Corporation Tax Bureau. The Bureau subsequently denied permission to file on a combined basis and issued statements of audit adjustment on March 15, 1973, and subsequent notices of deficiency on May 15, 1973, computing taxes on an individual basis as follows:

Montauk Improvement, Inc. - Fiscal Year Ended April 30, 1969

Entire net income	$248,419.28
Tax at 7%	17,389.35
Subsidiary capital tax ($708,332.29 at .000625)	442.71
Total tax	17,832.06
Tax per report	5,796.40
Deficiency	12,035.66

Montauk Improvement, Inc. - Fiscal Year Ended April 30, 1970

Entire net income	$118,544.77
Tax at 7%	8,298.13
Subsidiary capital tax ($2,065,444.83 at .000625)	1,290.90
Total tax	9,589.03
Payment with report	3,828.46
Deficiency	5,760.57

Montauk Country Club, Inc. - Fiscal Year Ended April 30, 1969

Total capital per schedule E of CT-3 report	$2,208,928.00
Tax at .00125	2,761.16
Payment	100.00
Deficiency	2,661.16

Montauk Country Club, Inc. - Fiscal Year Ended April 30, 1970

Total capital per schedule E of CT-3 report	$3,535,038.00
Tax at .00125	4,418.80
Payment	650.00
Deficiency	3,768.80

8. For the fiscal year ended April 30, 1970, Improvement should have been credited with $6,354.84 payment with report, instead of $3,828.46, resulting in a revised deficiency for that year of $3,234.19, instead of $5,760.57.

9. The petitioners contend that the notices of deficiency issued for their respective fiscal years ended April 30, 1969 were untimely, since the returns were mailed on January 15, 1970, and the notices of deficiency were issued on May 15, 1973, which is in excess of the three-year assessment period provided in Sec. 1083(a) of the Tax Law.

Returns were mailed by the petitioners on January 15, 1970 as follows:

(a) Return of Montauk Improvement, Inc. on individual form CT-3 indicating the amount of tax liability on a combined basis.

(b) Return of Montauk Country Club, Inc. on individual form CT-3 indicating the amount of tax liability on a combined basis.

(c) Return of Montauk Improvement, Inc. and Montauk Country Club, Inc. on combined form CT-3A showing computation of tax liability on a combined basis.

CONCLUSIONS OF LAW

A. That the notices of deficiency issued against Montauk Improvement, Inc. and Montauk Country Club, Inc. for the fiscal year of each corporation ended April 30, 1969 were not issued within the three-year limitation on assessment provided by section 1083(a) of the Tax Law and were thus not timely issued.

B. That section 211.4 of the Tax Law authorizes the Tax Commission, in its discretion, to require or permit a domestic parent corporation (e.g. Montauk Improvement, Inc.) and its wholly-owned domestic subsidiary (e.g. Montauk Country Club, Inc.) to make a report on a combined basis. This authorization also applies to foreign corporations doing business in New York. No combined report covering a foreign corporation not doing business in New York may be required, however, unless the Tax Commission deems it necessary (because of intercompany transactions or some agreement, understanding, arrangement or transaction which distorts income or capital) in order to properly reflect tax liabilities.

C. During the periods at issue, the State Tax Commission provided, by regulation, that in determining whether the tax would be computed on a combined basis, it would consider various factors, including the following:

(1) Whether the corporations were engaged in the same or related lines of business;

(2) Whether any of the corporations were in substance merely departments of a unitary business conducted by the entire group;

(3) Whether the products of any of the corporations were sold to or used by any of the other corporations;

(4) Whether any of the corporations performed services for, or loaned money to or otherwise financed or assisted in the operations of, any of the other corporations;

(5) Whether there were other substantial intercompany transactions among the constituent corporations.

(former 20 NYCRR 5.28(b))

The essential elements of these factors have been carried over into the current regulations which were effective for taxable years beginning on or after January 1, 1976 and which provide, in pertinent part:

"In deciding whether to permit or require combined reports the following two (2) broad factors must be met:

(1) the corporations are in substance parts of a unitary business conducted by the entire group of corporations, and

(2) there are substantial intercorporate transactions among the corporations."

(20 NYCRR 6-2.3(a) (Emphasis supplied)

The mandatory language of the current regulations takes cognizance of those elements which the Tax Commission has consistently

deemed to be the key factors in determining whether combination should be permitted or required, i.e., the unitary nature of the business conducted by the corporations and whether there were substantial intercorporate transactions among the corporations. (See: Petition of Annel Holding Corp., et al. State Tax Commission, August 2, 1973, Determination confirmed, Annel Holding Corp. v. Procaccino, 77 Misc. 2d 886 (Sup. Ct. Albany County, 1974); Petition of N. K. Winston Corporation, et al. State Tax Commission, August 21, 1974.)

The petitioners herein have not only failed to show that they were each, in substance, part of a unitary business, but have also failed to show that there were substantial intercorporate transactions between them. Accordingly, permission to file on a combined basis is denied.

D. That the notices of deficiency issued against Montauk Improvement, Inc. and Montauk Country Club, Inc. for the fiscal years of each corporation ended April 30, 1969 are hereby cancelled; the notices of deficiency issued against Montauk Improvement, Inc. (corrected as per paragraph 8, above) and Montauk Country Club, Inc. for the fiscal years of each corporation ended April 30, 1970 are sustained.

DATED: Albany, New York
SEP 28 1979

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER